

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	
)	
AERIAL COMMUNICATIONS, INC.,)	
Transferor,)	
)	
and)	WT Docket No. 00-3
)	
VOICESTREAM WIRELESS HOLDING)	
CORPORATION,)	
Transferee,)	
)	
For Consent to Transfer of Control)	
of Licenses and Authorizations)	
)	
and)	
)	
In re Request of)	
)	
VOICESTREAM PCS I LICENSE L.L.C.)	File No. CWD 98-89
)	
For Waiver of Section 20.6 of the)	
Commission's Rules)	
)	
and)	
)	
VOICESTREAM WIRELESS)	
CORPORATION, VOICESTREAM)	
WIRELESS HOLDING CORPORATION,)	
TELEPHONE AND DATA SYSTEMS, INC.,)	
and AERIAL COMMUNICATIONS, INC.)	
)	
Request for Declaratory Ruling – Compliance)	
With Section 20.6 of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2000

Released: March 31, 2000

By the Chief, Wireless Telecommunications Bureau, and Chief, International Bureau:

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I. INTRODUCTION

1. In this Order, we grant the applications of VoiceStream Wireless Corporation (“VoiceStream Washington”), VoiceStream Wireless Holding Corporation (“VoiceStream”), and Aerial Communications, Inc. (“Aerial”)(collectively, “Applicants”) to transfer control of Aerial’s licenses and authorizations from Aerial’s parent corporation, Telephone and Data Systems, Inc. (“TDS”), to VoiceStream. We also grant the joint petition filed by the Federal Bureau of Investigation (“FBI”), the U.S. Department of Justice (“DOJ”), Aerial, and VoiceStream to condition grant of the applications on compliance with an agreement entered into by the petitioners regarding foreign ownership and national security issues. We also grant, in part, a Request for Declaratory Ruling regarding certain Commercial Mobile Radio Services

("CMRS") spectrum cap attribution issues, filed in connection with the proposed transfers of control.

II. BACKGROUND

2. Aerial is a publicly traded corporation headquartered in the state of Illinois. Aerial provides Personal Communications Services ("PCS") using GSM technology in six service areas, primarily in the eastern United States, that cover approximately 28 million people.¹ TDS, a publicly traded corporation also headquartered in the state of Illinois, owns approximately 82 percent of Aerial.²

3. VoiceStream Washington, a publicly traded corporation headquartered in the state of Washington, is a wholly-owned subsidiary of VoiceStream, a Delaware corporation.³ VoiceStream constructs and operates PCS systems. Using GSM technology, VoiceStream offers traditional cellular-like telephony as well as a range of advanced mobile services, including paging, e-mail, facsimile, voicemail, and Internet access.⁴ As part of the instant transaction, Aerial will become a wholly-owned subsidiary of VoiceStream.⁵ VoiceStream's largest shareholder is Hutchison Telecommunications PCS (USA) Limited, a British Virgin Islands corporation, which is a subsidiary of Hutchison Wampoa Limited, a Hong Kong corporation.⁶

4. On December 1, 1999, Aerial and VoiceStream filed applications pursuant to

¹ Applications of VoiceStream Wireless Holding Corporation and Aerial Communications, Inc. WT Docket No. 00-3, File No. 0000053257 (lead application), filed December 1, 1999, Attachment 1 (Description of Transaction) to FCC Form 603 at 2 ("Public Interest Statement").

² *Id.*

³ *Id.* at 2 and 9. VoiceStream Washington became a wholly-owned subsidiary of VoiceStream as a result of the recent merger between VoiceStream Washington and Omnipoint Corporation ("Omnipoint"). The Commission approved the necessary transfers of control and assignments of VoiceStream Washington's and Omnipoint's licenses and authorizations on February 14, 2000. *See Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, et al.*, Memorandum Opinion and Order, FCC 00-53 (rel. Feb. 15, 2000) ("VoiceStream/Omnipoint Order"). *See also, Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, et al.*, Errata, DA 00-509 (rel. Mar. 6, 2000). On March 23, 2000, the Applicants notified the Commission that, following consummation of the Omnipoint transaction, VoiceStream Wireless Holding Corporation had changed its name to VoiceStream Wireless Corporation, and its wholly-owned subsidiary formerly known as VoiceStream Wireless Corporation had changed its name to VoiceStream Washington Corporation. *See Letter from Louis Gurman and George Wheeler, Counsel for the Applicants, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed Mar. 23, 2000 ("March 23 Ex Parte Letter").* In the instant Order, we will use the term "VoiceStream" to refer to the parent corporation of Omnipoint and VoiceStream Washington. Further, as a consequence of the merger of VoiceStream Washington and Omnipoint, we will also treat interests described in the applications addressed herein (which were filed prior to Commission action on the Omnipoint transaction) as being held by the former "VoiceStream Wireless Corporation" (now known as VoiceStream Washington) as interests held by VoiceStream (formerly known as "VoiceStream Wireless Holding Corporation").

⁴ Public Interest Statement at 2 and 9.

⁵ *Id.* at 1 and 4-5.

⁶ *Id.* at 4.

sections 214(a) and 310(b) and (d) of the Communications Act of 1934, as amended ("the Act"),⁷ seeking Commission consent to transfer control of Aerial's licenses and authorizations from TDS to VoiceStream. These applications were filed in the context of the proposed merger of VoiceStream and Aerial, which is, in turn, related to the recent merger of VoiceStream and Omnipoint Corporation ("Omnipoint").⁸ In connection with the instant transfer applications, VoiceStream Washington, VoiceStream, Aerial, and TDS also filed on December 1, 1999 a Request for Declaratory Ruling with regard to certain spectrum cap attribution issues.⁹ On January 7, 2000, the Wireless Telecommunications Bureau ("Wireless Bureau") and the International Bureau, on delegated authority,¹⁰ issued a Public Notice to announce that the applications had been accepted for filing, and to establish a pleading cycle to permit interested parties an opportunity to comment on the proposed transaction and the Request for Declaratory Ruling.¹¹

5. According to the Applicants, the combination of VoiceStream and Aerial will bring together two major providers of GSM services in the United States, creating one of the largest wireless carriers in the country by population covered and one of the largest entities in the world employing GSM technology. It will also further enable international roaming throughout the 133 countries that have adopted the GSM standard.¹² The combined company will hold licenses to provide service to an area covering more than 200 million people in the United States and will provide service to more than 1.5 million customers.¹³ Applicants state that this merger will facilitate creation of a seamless national network capable of competing with other established nationwide providers.

6. In response to the *Acceptance Public Notice*, only one filing was received. The FBI, DOJ, Aerial and VoiceStream filed a joint petition asking us to condition grant of these applications on compliance with a January 26, 2000 agreement between the agencies and VoiceStream relating to the level of permissible indirect foreign ownership in VoiceStream.¹⁴

⁷ 47 U.S.C. §§ 214(a), 310(b), 310(d).

⁸ See note 3, *supra*. As a result of these mergers, VoiceStream Washington, Omnipoint, and Aerial all will be wholly-owned subsidiaries of VoiceStream.

⁹ See Request for Declaratory Ruling – Compliance with Section 20.6 of the Commission's Rules, filed Dec. 1, 1999 by VoiceStream Wireless Corporation, VoiceStream Wireless Holding Corporation, Aerial Communications, Inc., and Telephone and Data Systems, Inc. ("Request for Declaratory Ruling").

¹⁰ 47 C.F.R. §§ 0.261, 0.331.

¹¹ See *VoiceStream Wireless Holding Corporation and Aerial Communications, Inc. Seek FCC Consent for Transfer of Control of Licenses and Authorizations*, Public Notice, DA 00-24 (rel. Jan. 7, 2000) ("Acceptance Public Notice").

¹² Public Interest Statement at 10-11.

¹³ *Id.* at 2, 10. These figures include the licenses of VoiceStream, as well as licenses held by certain companies that are 49-percent-owned by VoiceStream or Omnipoint but are under the control of Cook Inlet Region, Inc. ("Cook Inlet"). *Id.*

¹⁴ See Joint Petition to Adopt Conditions to Authorizations and Licenses, filed Feb. 7, 2000, by Aerial Communications, Inc., VoiceStream Wireless Holding Corporation, the United States Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI Petition to Adopt").

This request is addressed in Section III.D below.

III. DISCUSSION

7. As explained below, we find that the proposed transfer of control of Aerial's licenses and authorizations to VoiceStream poses no risk of harm to U.S. telecommunications markets and would permit the merged companies to form a near-nationwide GSM network capable of competing more effectively with other nationwide service offerings. Accordingly, we find that, pursuant to sections 214(a), 310(b), and 310(d) of the Act, grant of the pending requests for transfer of control would serve the public interest. As discussed below, we also adopt the conditions requested in the DOJ/FBI Petition to Adopt, and grant, in part, the Request for Declaratory Ruling.

A. Statutory Authority

8. Pursuant to section 214(a) of the Act, the Commission must determine whether the Applicants have demonstrated that their proposed transaction will serve the public interest, convenience and necessity.¹⁵ Section 310(d) of the Act provides, in pertinent part, that "[n]o construction permit, or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."¹⁶ Section 310(d) also requires the Commission to consider the license transfer or assignment application as if it were filed pursuant to section 308 of the Act, which governs applications for new facilities and for renewal of existing licenses.¹⁷

9. In applying the public interest test under Section 310(d), the Commission considers four overriding questions: (1) whether the transaction would result in a violation of the Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Act or interfere with the objectives of that and other statutes; and (4) whether the transaction promises to yield affirmative public interest benefits.¹⁸ In cases such as this that involve an international carrier,

¹⁵ 47 U.S.C. § 214(a). See *Applications of WorldCom and MCI Communications Corporation*, 13 FCC Red 18,025, 18,030, at ¶ 8 (1998) ("WorldCom/MCI Order").

¹⁶ 47 U.S.C. § 310(d).

¹⁷ Section 310 provides that the Commission shall consider any such applications "as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question." 47 C.F.R. § 310(d). Furthermore, the Commission is expressly barred from considering "whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." *Id.*

¹⁸ See *Applications of Ameritech Corp. and SBC Communications Inc. for Transfer of Control*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279, at ¶¶ 49-50 (rel. Oct. 8, 1999) ("SBC/Ameritech Order"); *WorldCom/MCI Order*, 13 FCC Red at 18,030-33, ¶¶ 9-12 (citing *Applications of NYNEX Corporation and Bell*

we are guided also by the U.S. Government's commitment under the World Trade Organization ("WTO") Basic Telecommunications Agreement, which seeks to promote global markets for telecommunications so that consumers may enjoy the benefits of competition.¹⁹ In summary, the Applicants bear the burden of demonstrating that the transaction will not violate or interfere with the objectives of the Act or Commission rules, and that the predominant effect of the transfer will be to advance the public interest.²⁰ Prior to approving these applications, we must determine whether the Applicants have met this burden.²¹

B. Qualifications

10. In evaluating transfer of control applications under section 310(d) of the Act, we do not re-evaluate the qualifications of the transferor unless issues related to its basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.²² No such issues exist here with respect to TDS or Aerial. By contrast, as a regular part of our analysis of transfer of control applications, we determine whether the proposed transferee is qualified to hold Commission licenses.²³ In this case, no party has challenged the qualifications of proposed transferee VoiceStream. Based on our independent review of the qualifications of the transferee, we conclude that we need examine further only the legal qualifications of VoiceStream with respect to its foreign ownership.

11. Under section 310(b)(4) of the Act, the Commission must determine whether the public interest would be served by allowing a common carrier licensee to have indirect foreign

Atlantic Corporation, Memorandum Opinion and Order, 12 FCC Rcd 19,985, 19,987 ¶ 2 & n.2 (1997) ("Bell Atlantic/NYNEX Order"); *Applications of MCI Communications Corporation and British Telecommunications P.L.C.*, Memorandum Opinion and Order, 12 FCC Rcd 15, 351, 15,367 ¶ 33 (1997) ("BT/MCI Order").

¹⁹ The commitments undertaken as a result of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS. *Fourth Protocol to the General Agreement on Trade in Services (WTO 1997)*, 36 I.L.M. 354, 366 (1997). These commitments are colloquially referred to as the WTO Basic Telecom Agreement, though they are not technically contained in a stand-alone agreement.

²⁰ *WorldCom/MCI Order*, 13 FCC Rcd at 18,031 ¶ 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant) and *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 F.C.C.2d 734, 736-37 ¶¶ 2-3 (1975) (burden of proof is on licensee on issue of whether applicants have the requisite qualifications to be or to remain Commission licensees and whether grant of applications would serve public interest, convenience and necessity)).

²¹ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,001, 20,007, ¶¶ 29, 36; *BT/MCI Order*, 12 FCC Rcd at 15,367 ¶ 33.

²² See *MobileMedia Corporation et al.*, 14 FCC Rcd 8017 ¶4 (rel. Feb. 5, 1999) (citing *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964)); see also Stephen F. Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. *Id.*

²³ See *In re applications of AirTouch Communications, Inc. and Vodafone Group, Plc.*, Memorandum Opinion and Order, DA 99-1200, 1999 WL 413,237 (WTB rel. June 22, 1999) at ¶¶ 5-9 ("Vodafone AirTouch Order").

ownership that exceeds 25 percent.²⁴ As a result of the transaction, Hutchison Whampoa Limited ("Hutchison"), a limited liability holding company based in the Hong Kong Special Administrative Region ("Hong Kong") of the People's Republic of China, will have indirect ownership of 23.08 percent in VoiceStream.²⁵ In addition, Sonera Ltd. ("Sonera"), a Finnish company, will have a direct 8.63 percent interest in VoiceStream.²⁶ Thus, because aggregate indirect foreign investment in VoiceStream will exceed the 25 percent benchmark, a public interest analysis under section 310(b)(4) is required.²⁷

12. In the *Foreign Participation Order*, the Commission stated that additional foreign investment from countries with competitive markets can promote competition in the U.S. market. It therefore concluded the public interest generally would be served by permitting more open investment by foreign entities whose home markets are members of the WTO.²⁸ In such cases, there is a presumption that no competitive concerns are raised by the indirect foreign investment.²⁹ Both Hutchison and Sonera, foreign entities whose home markets are members of the WTO, are entitled to this presumption. The Commission also stated in the *Foreign Participation Order* that parties that have already received approval to exceed the 25 percent benchmark up to a certain level of indirect foreign ownership must seek further Commission approval in order to increase that level of ownership.³⁰

13. In a prior proceeding, the Commission determined that Hong Kong, a WTO member, was Hutchison's principal place of business.³¹ Based on information provided in the record for this proceeding, we find that Hong Kong continues to be Hutchison's principal place of business.³²

14. In the *VoiceStream/Omnipoint Order* released on February 15, 2000, the Commission approved Hutchison's investment in VoiceStream in an amount up to 30.6

²⁴ 47 U.S.C. § 310 (b)(4); see also *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order, 12 FCC Rcd 23,891, 23,935 ¶ 97 (1997), recon. pending ("Foreign Participation Order").

²⁵ See FCC Ownership Disclosure Information for the Wireless Telecommunications Services (FCC Form 602), filed Dec. 1, 1999 by VoiceStream Wireless Holding Corporation at Schedule A.

²⁶ *Id.* We include this Sonera direct ownership in the calculation of aggregate indirect foreign investment in VoiceStream. We also note that TDS, through foreign ownership of TDS, will hold a *de minimis* indirect foreign investment interest (approximately 2.27 percent) in VoiceStream as a result of the proposed transaction.

²⁷ *Foreign Participation Order*, 12 FCC Rcd at 23,935 ¶ 97.

²⁸ See *id.* at 23,940 ¶ 111.

²⁹ *Id.* at 23,913, 23,941-42 ¶¶ 50, 113, 116.

³⁰ *Id.* at 23,941 ¶ 114 (accepting the FBI's assertion that increases in indirect foreign ownership or influence may present concerns that Executive Branch agencies may need an opportunity to evaluate before the Commission allows an increased level of foreign ownership).

³¹ See *VoiceStream/Omnipoint Order*, FCC 00-53 at ¶¶ 15, 17.

³² See Public Interest Statement at 12.

percent.³³ It also stated that VoiceStream would need additional Commission authority under section 310(b)(4) before Hutchison could *increase* its investment above this authorized level.³⁴ Because Hutchison's indirect foreign investment in VoiceStream will decline to 23.08 percent, rather than increase, as a result of the current transaction, VoiceStream is not required to seek Commission approval. We leave undisturbed, therefore, our prior decision allowing Hutchison to increase its foreign ownership in VoiceStream up to 30.6 percent without additional approval.³⁵

15. With respect to Sonera's proposed investment in VoiceStream, we note that, in the prior proceeding, the Commission required VoiceStream to seek additional Commission authority before any non-Hong Kong or non-U.S. entities could acquire, in the aggregate, a greater than 25 percent indirect interest in its licensee subsidiaries.³⁶ Because Sonera is incorporated in Finland, VoiceStream would be required to seek Commission approval for Sonera's proposed investment in VoiceStream only if Sonera's indirect ownership would exceed the 25-percent indirect foreign ownership benchmark contained in section 310(b)(4). Because Sonera's proposed investment would amount to only 8.63 percent of VoiceStream's stock, we conclude that VoiceStream is not required to obtain Commission approval for the investment.³⁷

16. Accordingly, noting the Executive Branch's concerns with respect to the proposed transaction set forth in Section III.D.4 of this Order, we conclude, pursuant to section 310(b)(4) and the Commission's *Foreign Participation Order*, that the public interest would be served by allowing the proposed indirect foreign ownership, subject to the terms and conditions set forth herein. In effect, this ruling affirms the Commission's prior order permitting the common carrier licensees of VoiceStream to be indirectly owned by Hutchison in an amount up to 30.6 percent. We emphasize, however, that VoiceStream would need additional authority before any other foreign entity or entities acquire, in the aggregate, a greater-than-25-percent indirect interest in its licensee subsidiaries.³⁸ In addition, we note that, under the *Foreign Participation Order*, the merged company may permit up to and including 25 percent indirect foreign ownership in addition to Hutchison's indirect foreign ownership in VoiceStream.³⁹ If the merged company intends to permit a greater-than-25-percent indirect foreign ownership by any entity other than Hutchison, or if Hutchison proposes to increase its current indirect foreign interests above 30.6 percent, VoiceStream must obtain additional Commission approval to do so.

³³ See *VoiceStream/Omnipoint Order*, FCC 00-53 at ¶ 19.

³⁴ See *id.* See also *Foreign Participation Order*, 12 FCC Rcd at 23,941 ¶ 114.

³⁵ Assuming relevant circumstances remain the same.

³⁶ See *VoiceStream/Omnipoint Order*, FCC 00-53 at ¶¶ 19-20.

³⁷ We reach the same conclusion with respect to the approximate 2.27 percent indirect foreign interest held in VoiceStream as a result of foreign ownership in TDS.

³⁸ For this purpose, non-U.S. and non-Hong Kong ownership of Hutchison would be included in the total indirect foreign ownership of the licensee subsidiaries.

³⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23,941 ¶ 114.

C. Request for Declaratory Ruling Regarding CMRS Spectrum Cap Attribution

17. As a predicate to our public interest analysis below, we first grant in part the Request for Declaratory Ruling regarding attribution for purposes of the CMRS spectrum cap. First, the parties ask us to confirm their conclusions that, once the VoiceStream/Aerial merger has been consummated, certain licenses now attributable to VoiceStream or TDS for purposes of determining compliance with the CMRS spectrum cap rule will not be attributable to *both* as a result of TDS's proposed ownership interest in VoiceStream and its right to appoint one director to VoiceStream's board.⁴⁰ Specifically, the parties ask us to confirm their conclusions that: (1) the licenses of United States Cellular Corporation ("US Cellular") that are currently attributable to TDS will not become attributable to Western Wireless Corporation ("Western Wireless"), VoiceStream Washington, and VoiceStream; (2) the licenses of Western Wireless will not become attributable to TDS and US Cellular; (3) the licenses of VoiceStream will not become attributable to TDS and US Cellular; (4) the licenses of the limited partnership controlled by Cook Inlet, in which VoiceStream indirectly holds a limited partnership interest, will not become attributable to TDS; and (5) the licenses of Iowa Wireless Network Services Holding Company ("Iowa Wireless"), in which VoiceStream holds a non-controlling 38-percent equity interest, will not become attributable to TDS.⁴¹ Second, the parties ask us to confirm their conclusion that the licenses of Rural Cellular Corporation ("RCC") will not become attributable to VoiceStream, VoiceStream Washington, or Western Wireless by virtue of VoiceStream's acquisition of Aerial's 30-percent equity interest in Wireless Alliance LLC ("Wireless Alliance"), a joint venture in which RCC holds the remaining 70 percent.⁴² To the extent we disagree with the parties' conclusions and determine that any of these licenses are attributable to VoiceStream or TDS, the parties alternatively ask for permanent waivers of section 20.6.⁴³ No parties filed in response to the public notice of the Request for Declaratory Ruling.

18. We note that the parties have based their attribution analysis on three aspects of our spectrum cap policies: attribution through 20 percent or greater ownership interest,⁴⁴ attribution through a corporate director,⁴⁵ and attribution through a joint venture.⁴⁶ We address

⁴⁰ Request for Declaratory Ruling at 3. We note that, because the Request for Declaratory Ruling was filed prior to Commission action on the VoiceStream/Omnipoint transaction, the parties do not seek a separate determination regarding the licenses of Omnipoint that VoiceStream acquired through the merger between VoiceStream Washington and Omnipoint. Accordingly, we do not address attribution of the Omnipoint licenses specifically; however, we necessarily recognize that Omnipoint is now a wholly-owned subsidiary of VoiceStream, and its licenses are directly attributable to VoiceStream.

⁴¹ *Id.* at 3-6. We note that the parties conclude, or do not dispute, that the licenses of Western Wireless and Cook Inlet are attributable to VoiceStream for section 20.6 purposes. *Id.* at 3 and 5-6.

⁴² *Id.* at 6, *see also March 23 Ex Parte Letter* at 2.

⁴³ Request for Declaratory Ruling at 3.

⁴⁴ *See* 47 C.F.R. § 20.6(d)(2) and (8).

⁴⁵ *See* 47 C.F.R. § 20.6(d)(7).

⁴⁶ *See In the Matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, etc.*, WT Dkt. Nos. 98-205 and 96-59, GN Dkt. No. 93-252, Report and Order, FCC

below these three attribution criteria and their application to the parties' Request for Declaratory Ruling.

a. Ownership Interests

19. Section 20.6(d)(2) of the Commission's rules provides that partnership, ownership, and stock interests amounting to 20 percent or more of the equity, outstanding stock, or outstanding voting stock of a broadband PCS licensee or applicant, cellular licensee, or SMR licensee shall be attributable to the holders of such interests.⁴⁷ The parties state that TDS's equity interest in VoiceStream following the merger of Aerial and VoiceStream will be less than 20 percent,⁴⁸ and, therefore, conclude that the licenses under the control of VoiceStream are not attributable to TDS.⁴⁹ We agree that TDS's less-than-20-percent equity interest in VoiceStream would not cause attribution of VoiceStream's licenses to TDS pursuant to section 20.6(d)(2). We also agree with the parties' conclusion, using the multiplier found in section 20.6(d)(8) of the Commission's rules, that because TDS would hold less than 20 percent of VoiceStream's equity, TDS would not be deemed to hold an attributable interest under section 20.6(d)(2) in the licenses of those entities with which VoiceStream is affiliated or in which VoiceStream holds ownership interests, including VoiceStream Washington, Cook Inlet, Iowa Wireless, Wireless Alliance, and Western Wireless.⁵⁰ Second, the parties state that VoiceStream and Western Wireless do not hold any equity interests in TDS or US Cellular, and therefore conclude that the licenses of VoiceStream and Western Wireless should not be attributed to TDS or US Cellular pursuant to 20.6(d)(2).⁵¹ We agree that section 20.6(d)(2) does not require attribution in this situation.

b. Directors and Officers

20. Section 20.6(d)(7) of the Commission's rules provides that officers and directors of a broadband PCS licensee or applicant, cellular licensee, or SMR licensee shall be considered to have an attributable interest in the entity with which they are so associated.⁵² Officers and directors are attributed with their company's holdings because of the Commission's concerns

99-244, 1999 WL 734848 at ¶98 (rel. Sept. 22, 1999) ("Spectrum Cap Order").

⁴⁷ 47 C.F.R. §20.6(d)(2)

⁴⁸ See Request for Declaratory Ruling at 2-3. In addition, the Applicants stated that TDS would hold an ownership and voting power block of approximately 16.18 percent of VoiceStream following the Aerial/VoiceStream transaction. See Public Interest Statement at 5-6. The Applicants recently updated the percentage of TDS's interest in VoiceStream following the Aerial/VoiceStream transaction to be 15.94 percent. See *March 23 Ex Parte Letter* at 3.

⁴⁹ Request for Declaratory Ruling at 2-3.

⁵⁰ *Id.* at 2-6. See 47 C.F.R. §20.6(d)(2) and (d)(8).

⁵¹ Request for Declaratory Ruling at 3.

⁵² See 47 C.F.R. §20.6(d)(7). Further, the rule provides that officers and directors of an entity controlling a broadband PCS licensee or applicant, a cellular licensee, or an SMR licensee shall be considered to have an attributable interest in such entities.

about directors' ability to use their positions and influence to coordinate behavior of the licensees on whose boards they sit, and the risk that they may pass non-public information between such licensees.⁵³ The Commission, however, has indicated that it would consider granting a waiver "in a particular case if the specific circumstances of a directorship allay" the above-referenced concerns.⁵⁴

21. In the instant situation, the parties have indicated that, as a result of the proposed transfers of control, TDS will have the right to appoint one director to the 17-member post-merger VoiceStream board for so long as TDS holds 4,500,000 shares of VoiceStream common stock.⁵⁵ The parties argue that TDS's exercise of this right should not create an attributable interest to TDS in VoiceStream because the parties have taken steps to ensure that any director appointed by TDS would be sufficiently insulated from TDS so as to avoid "significant opportunity for anticompetitive influence."⁵⁶ In the alternative, the parties request a permanent waiver of section 20.6, generally, so as not to attribute an interest in VoiceStream's licenses to TDS.⁵⁷ We need not rule as to whether TDS's ability to appoint one director in these circumstances would constitute an attributable interest, because we find that sufficient grounds exist for conditionally granting a waiver of any such attribution that might otherwise be made pursuant to section 20.6(d)(7), based on the methods and procedures established by the parties to insulate this director, discussed below.

22. The parties indicate that TDS and the other VoiceStream stockholders have agreed that the director whom they will elect as designated by TDS cannot be "an officer, director, management level employee or affiliate of TDS or of any person in which TDS or an affiliate of TDS has an 'attributable interest' as defined in the Commission's rules."⁵⁸ TDS also confirms that it will take the necessary "steps to prevent the receipt by an official or employee of TDS of any inappropriate non-public information about VoiceStream from the director of VoiceStream appointed by TDS and to prevent any official or employee of TDS from providing to such director any information intended significantly to influence the nature of types of services offered by VoiceStream, the terms upon which such services are offered, or the prices charged for such services in service areas where the operations of VoiceStream and the cellular subsidiary of TDS overlap."⁵⁹

23. We believe that the above-referenced procedures and agreements established to

⁵³ See *Spectrum Cap Order*, FCC 99-244 at ¶97.

⁵⁴ *Id.*

⁵⁵ Request for Declaratory Ruling at 4.

⁵⁶ *Id.* at 4-5.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.* at 4. See also *March 23 Ex Parte Letter* at 2-3 (citing to Section 1 ("Qualified TDS Designee"), Voting Agreement, among VoiceStream Wireless Holding Corporation and its shareholders, dated February 25, 2000).

⁵⁹ Request for Declaratory Ruling at 4.

insulate the VoiceStream director appointed by TDS from providing to (or receiving from) TDS the types of competitive information that could be used to influence market behavior, and that TDS will appoint only one of 17 directors, justify granting the parties a waiver of section 20.6(d)(7) so as not to attribute VoiceStream's attributable spectrum holdings to TDS in this instance.⁶⁰ We also note that TDS and VoiceStream will not have common officers, directors, or key management employees.⁶¹ While we agree with the parties that directors owe various fiduciary duties and legal obligations, including confidentiality, to the companies and shareholders on the boards on which they sit⁶² -- and we believe that these common law duties and obligations will help insulate any board member appointed by TDS -- grant of this waiver is conditioned upon the parties instituting and complying with the above-referenced insulation methods to ensure that any VoiceStream board member selected by TDS is independent from, and does not owe a fiduciary duty to, TDS.⁶³

24. Grant of this waiver also means that the spectrum holdings attributable to VoiceStream through its affiliation or ownership interests in the Cook Inlet joint venture, Iowa Wireless, and Western Wireless are not attributable to TDS or US Cellular because of TDS's right to appoint a director to VoiceStream's board. Conversely, having waived attribution of VoiceStream's holdings to TDS in this limited instance, and in effect, having severed the attributable connection between VoiceStream and TDS through the TDS-appointed director, we find that the spectrum holdings of TDS and US Cellular would not be attributable on this basis to VoiceStream, its subsidiaries, or affiliates with respect to the proposed transfers of control.⁶⁴

c. Joint Ventures

25. The Commission also looks at partnership interests, limited partnership interests, and joint ownership relationships to determine attribution for spectrum cap compliance.⁶⁵ For

⁶⁰ We note, however, that the parties indicate in the Request for Declaratory Ruling that, any time TDS owns more than 9,800,000 shares of VoiceStream common stock and Sonera owns fewer than 4,500,000 shares of VoiceStream common stock, TDS will have the right to designate two directors of the VoiceStream board. *Id.* at 4, n. 5. We clarify that grant of the instant waiver addresses only the appointment of one director by TDS to VoiceStream's board and does not provide authority in the circumstance in which TDS would appoint two directors to VoiceStream's board. Grant of the instant waiver to allow one TDS-appointed director to VoiceStream's board not to be attributed under section 20.6(d)(7) is premised not only on the insulation methods outlined above but also on the fact that the TDS-appointed director is only one of 17 directors. The appointment of two directors by TDS to VoiceStream's board, or a reduction in the number of members of VoiceStream's board, would pose new circumstances requiring fresh review of the appropriateness of a waiver.

⁶¹ *Id.* at 3. The parties also indicate that one director of TDS, who is also an officer of a wholly-owned subsidiary of Sonera, will resign from the TDS board concurrently with the closing of the VoiceStream/Aerial transaction. *Id.* at n. 12.

⁶² *Id.* at 5.

⁶³ We recognize the general duty owed by a director of VoiceStream to all of VoiceStream shareholders, of which TDS will be one. Our condition applies to other, independent fiduciary duties such director might owe to TDS.

⁶⁴ This limited finding does not address the general issue of reciprocal attribution under section 20.6(d), and merely reflects grant of the instant waiver.

⁶⁵ See 47 C.F.R. § 20.6(d) and *Spectrum Cap Order*, FCC 99-244 at ¶98.

example, the Commission recognizes that joint ownership interests may afford a non-controlling interest holder the opportunity to influence the conduct of the controlling partner. In addition, a partnership operating in one market may provide the means for one partner to influence the actions of the second partner in other markets where both also have interests.⁶⁶ The Commission has recognized, however, that not all joint ownership interests raise such concerns, and that such ownership relationships must be evaluated on a case-by-case basis.⁶⁷ Further, the Commission has instructed parties with this type of interest to seek a determination from the Commission regarding whether such interests are attributable under the spectrum cap.⁶⁸

26. Aerial and RCC currently participate in a joint venture, Wireless Alliance, which is a PCS licensee holding partitioned and disaggregated spectrum rights to serve various portions of Minnesota, North Dakota, South Dakota, and Wisconsin.⁶⁹ As a result of the proposed transfers of control, VoiceStream will acquire Aerial's 30-percent interest in Wireless Alliance, while the remaining 70-percent controlling interest will continue to be held by RCC, a publicly traded company holding cellular and other licenses.⁷⁰ The parties state that VoiceStream has no equity interest in RCC, no common officers, directors or key management personnel, and no management or joint marketing relationship with RCC apart from Aerial's participation in Wireless Alliance.⁷¹ The parties conclude that, because of these factors, the spectrum holdings of RCC, other than those in Wireless Alliance, should not be attributed to VoiceStream, VoiceStream Washington, or Western Wireless. For the reasons set forth below, we agree with the parties that this particular joint venture between VoiceStream and RCC will not raise significant prospects for exercising anticompetitive influence. Therefore, we find that the spectrum holdings of RCC should not be attributed to VoiceStream on this basis.

27. Although joint ownership relationships between VoiceStream and RCC create the potential for significant anticompetitive influence, the level of our concern over prospects for such influence depends on various factors, two of which are most pertinent here: (1) whether either joint venture partner may have leverage over the other partner through the collaborative interest; and (2) the extent to which these joint venture partners have opportunities and incentives to threaten competition in any other markets where both are, or might otherwise become, competitors.⁷²

28. First, based upon information provided by the parties, we find that the revenues of Wireless Alliance are dwarfed both by the combined revenues of VoiceStream's subsidiaries and

⁶⁶ See *id.* at ¶98.

⁶⁷ *Id.*

⁶⁸ *Id.* at n. 236.

⁶⁹ Request for Declaratory Ruling at 6.

⁷⁰ *Id.* and March 23, 2000 *Ex Parte* at 2.

⁷¹ Request for Declaratory Ruling at 6.

⁷² Under different circumstances, other factors may also be pertinent. See generally Antitrust Guidelines for Collaborations Among Competitors Issued in Draft by the Federal Trade Commission and the U.S. Department of Justice, 64 Fed. Reg. 54,484 (Oct. 6, 1999) ("FTC/DOJ Draft Joint Venture Guidelines").

by the total revenues of RCC.⁷³ Based on this information, we conclude that the financial performance of Wireless Alliance is unlikely to be significant to the overall financial performance of either VoiceStream or RCC. This diminishes our concern over prospects that this joint venture may be of sufficient financial and operational significance to either parent to create the opportunity for leverage and thereby result in anticompetitive effects in other markets.⁷⁴ Second, we find that there is currently no direct competition between VoiceStream and RCC in any market, and that near-term prospects for direct competition between these firms are limited. VoiceStream and RCC do have some overlapping CMRS licenses.⁷⁵ Except in two cities,⁷⁶ however, RCC's cellular operations are confined to Rural Service Areas ("RSAs"), while VoiceStream is focusing initially on the deployment of service to metropolitan areas.

29. In sum, under these circumstances, we find *de minimis* prospects for significant leverage because of the apparent negligible financial impact of the joint venture on either partner. We also conclude that there exists no current or imminent opportunity for the sharing of competitive information to be used to anticompetitive effect. Therefore, we will not attribute the spectrum holdings of RCC (other than those in Wireless Alliance) to VoiceStream, VoiceStream Washington, or Western Wireless.⁷⁷

D. Public Interest Analysis

1. Competitive Framework

30. Where the transfer or assignment of licenses involves telecommunications service providers, the Commission's public interest determination must be guided primarily by the Act, as amended,⁷⁸ and, in this case, also by the WTO Basic Telecommunications Agreement.⁷⁹ Our analysis of competitive effects under the Commission's public interest standard consists of three

⁷³ Based on 1999 data provided by the Applicants, the revenues of Wireless Alliance were less than five percent of the revenues reported for the combinations of either VoiceStream/Omnipoint/Aerial or RCC/Triton Cellular Partners, L.P. See *March 23 Ex Parte Letter* at 1-2, as revised by Letter from Louis Gurman and George Wheeler, Counsel for Applicants, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed March 27, 2000, at 1-2 ("*March 27 Ex Parte Letter*").

⁷⁴ See *FTC/DOJ Draft Joint Venture Guidelines*, 64 Fed. Reg. 54,484 at Section 3.34(c).

⁷⁵ See *March 23 Ex Parte Letter* at Annex 1.

⁷⁶ These cities are Burlington, VT and Bangor, ME. See *March 27 Ex Parte Letter* at 1. According to the Applicants, VoiceStream currently is not operational in either city. *Id.*

⁷⁷ We do not believe that our conclusion in the instant situation departs from previous Commission precedent on this issue. Rather, we evaluate whether individual joint ventures create attributable interests under the spectrum cap rule on a case-by-case, fact-specific basis. See *Spectrum Cap Order*, FCC 99-244 at ¶98. Change in the underlying circumstances of any of the analyses above may result in different conclusions regarding attribution of one or more of the above-discussed interests.

⁷⁸ We note that the 1996 amendments to the Communications Act were specifically intended to produce competitive telecommunications markets. *AT&T Corporation, et al., v. Iowa Utils. Bd.*, 119 S. Ct. 721, 724 (1999).

⁷⁹ See *supra* ¶9 and note 19.

steps. First, we determine the markets potentially affected by the proposed transaction.⁸⁰ Second, we assess the effects that the transaction may have on competition in these markets.⁸¹ Third, we consider whether the proposed transaction will result in merger-specific public interest benefits.⁸² Ultimately, we must weigh any harmful and beneficial effects to determine whether, on balance, the merger is likely to enhance competition in the relevant markets.

2. Analysis of Potential Adverse Effects

a. Domestic Mobile Voice Services

31. According to Applicants, both VoiceStream and Aerial provide mobile communications services to U.S. consumers. VoiceStream subsidiaries and Aerial are both licensed to provide PCS services.⁸³ For purposes of conducting our public interest analysis, we also consider the license holdings of other entities whose interests are attributable to either VoiceStream or Aerial under the Commission's CMRS cross-ownership rules.⁸⁴ For present purposes, we attribute the licenses of both Western Wireless and Cook Inlet, and the subsidiaries of each, to VoiceStream.⁸⁵ We do not attribute licenses held by either TDS's subsidiary, US

⁸⁰ Our determination of the affected markets requires us to identify the Applicants' existing and potential product offerings, and may require us to determine which products offered by other firms compete or potentially compete with these offerings.

⁸¹ Depending on circumstances, this step may include the identification of market participants and analysis of market structure, market concentration, and potential entry.

⁸² These include but may extend beyond factors relating to cost reductions, productivity enhancements, or improved incentives for innovation. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,014, ¶ 49; *BT/MCI Order*, 12 FCC Rcd at 15,368, ¶ 35. *See also* Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. 41,552, §§ 2.1, 2.2, 4 (dated Apr. 2, 1992, as revised, Apr. 8, 1997).

⁸³ With respect to the provision of commercial communications services, VoiceStream, through its subsidiaries, also holds local multipoint distribution service ("LMDS") and specialized mobile radio ("SMR") licenses. *See* Public Interest Statement at 2. No competitive issues are raised with respect to these licenses, however, because Aerial does not hold licenses in these services, nor does it provide any service that competes with the services VoiceStream provides with these licenses.

In addition, VoiceStream subsidiaries hold licenses or authorizations in the fixed point-to-point microwave, Business Radio, Telephone Maintenance Radio, Experimental and Wireless Communications services. Aerial and its subsidiaries hold experimental and International 214 authorizations and applications. *See* Public Interest Statement at 1. Since the filing of the instant applications, Aerial subsidiary APT Minneapolis, Inc. has been granted licenses for several fixed point-to-point microwave facilities. *See Wireless Telecommunications Bureau Site-By-Site Action*, Public Notice, Report No. 463 (Mar. 1, 2000). The pending applications for these facilities were referenced in the applications for transfer of control of Aerial's PCS licenses. However, the Applicants have not filed applications requesting transfer of control for these licenses. Accordingly, this Order does not transfer control of these recently granted fixed point-to-point microwave licenses.

⁸⁴ *See generally* §§ 20.6(d) and 22.942(d).

⁸⁵ Public Interest Statement at 10, 17-22. The Commission previously determined the licenses of Western Wireless and of Cook Inlet and their subsidiaries to be attributable to VoiceStream for section 20.6 purposes. *See VoiceStream/Omnipoint Order*, FCC 00-53 at ¶23. In the *VoiceStream/Omnipoint Order*, the Commission based attribution of these licenses to VoiceStream on the fact that VoiceStream holds an indirect 49.9 percent equity interest in Cook Inlet, and that VoiceStream and Western Wireless also have common officers and directors. *Id.* at n. 68. *See*

Cellular, or RCC to VoiceStream, as explained above in our discussion of the parties' Request for Declaratory Ruling.⁸⁶

i. Overlapping Interests

32. In this section, we examine the competitive impact of overlapping interests attributable to the Applicants and determine that the proposed transfers of control will not reduce actual competition in any relevant market for mobile voice or data services. Both VoiceStream and Aerial provide mobile voice and short messaging services⁸⁷ to U.S. consumers principally using broadband PCS licenses. VoiceStream controls licenses to provide PCS services throughout much of the nation.⁸⁸ Aerial's subsidiaries hold PCS licenses in six MTA service areas scattered throughout the eastern half of the United States: Minneapolis-St. Paul, Tampa-St. Petersburg-Orlando, Houston, Pittsburgh, Kansas City, and Columbus (Ohio).⁸⁹ The PCS licenses held by VoiceStream and Aerial overlap geographically, and thereby implicate our spectrum cap rule, in 22 markets.⁹⁰ However, in none of these markets do VoiceStream and Aerial presently compete against each other for business,⁹¹ and we therefore conclude that this transaction will not result in the elimination of any existing competition in the provision of domestic mobile voice services. We recognize the possibility that Aerial and VoiceStream might have become competitors at some future date, and that merger of the two companies eliminates any such prospects. Our general policy, however, has been to permit the aggregation of CMRS spectrum and interests therein up to the limits permitted under the spectrum cap rule, provided that such aggregation neither reduces actual competition nor stymies the development of competition in any market.⁹² We find no special circumstances present here that warrant adopting a different view.

ii. Spectrum Cap Issues

33. As discussed above, the proposed transfers of control would result in the aggregation of spectrum in 22 markets in a manner that would exceed the Commission's spectrum aggregation limits.⁹³ In addition, in two RSAs within portions of the Oklahoma City BTA, VoiceStream currently holds spectrum in excess of the Commission's spectrum

also note 41, supra.

⁸⁶ See *supra*, Section III.C.

⁸⁷ Short messaging services provide for the transmission of alphanumeric messages and information comparable to those offered by traditional paging service providers.

⁸⁸ Donaldson, Lufkin & Jenrette, *The Global Wireless Communications Industry* (Winter 1999/2000) at 163-5.

⁸⁹ Public Interest Statement at 1. See also Donaldson, Lufkin & Jenrette, *The Global Wireless Communications Industry* (Winter 1999/2000) at 106.

⁹⁰ Public Interest Statement at 14-21. Attributable overlaps involve 22 markets in portions of two MTA and 13 BTA license areas. We note that the geographic footprints of Omnipoint and Aerial do not overlap. *Id.* at 14.

⁹¹ See *March 23 Ex Parte Letter* at 2 and Annex 3.

⁹² See *VoiceStream/Omnipoint Order*, FCC 00-53 at ¶26.

⁹³ 47 C.F.R. § 20.6.

aggregation limits.⁹⁴ For all 24 markets, the Applicants request additional time to come into compliance with section 20.6.⁹⁵ As discussed below, we will permit the Applicants a limited amount of additional time to come into compliance with section 20.6 in these markets.

(a) Oklahoma City

34. Prior to the filing of these applications, VoiceStream held spectrum in two RSAs within portions of the Oklahoma City BTA in excess of the section 20.6 permissible limits.⁹⁶ In 1998, VoiceStream filed a request for permanent waiver of the spectrum cap rule with respect to these license holdings.⁹⁷ The Wireless Bureau issued a Public Notice seeking comment on the waiver request,⁹⁸ and four parties filed in response.⁹⁹ On November 19, 1999, VoiceStream asked that its request for permanent waiver be considered a request for a temporary waiver,¹⁰⁰ thus rendering moot these pleadings.¹⁰¹ Specifically, VoiceStream requested that it be allowed to postpone compliance in the Oklahoma City MTA until September 1, 2000 or six months following Commission action on the VoiceStream/Omnipoint transaction, whichever is later.¹⁰²

(b) Other Areas

35. Elsewhere, in 22 distinct cellular service markets, Applicants would also exceed the Commission's spectrum aggregation limits upon consummation of the proposed transaction.¹⁰³ In each case, Applicants would hold 65 MHz of spectrum as a result of overlaps

⁹⁴ Public Interest Statement at 21.

⁹⁵ *Id.* at 15-21, and *see* ¶ 34 *infra*.

⁹⁶ *Id.* at 21.

⁹⁷ See Request of Western PCS I License Corporation for Waiver of Section 20.6 of the Commission's Rules, File No. CWD 98-89 (Jan. 29, 1998). The original waiver request was amended on May 7, 1999 to reflect that Western PCS I License Corporation had changed its name to VoiceStream PCS I License L.L.C. as a result of Western Wireless's spin off of its VoiceStream subsidiary.

⁹⁸ See *Wireless Telecommunications Bureau Seeks Comment on Western PCS I License Corporation Request for Waiver of Section 20.6 of the Commission's Rules*, Public Notice, File No. CWD 98-89, DA 98-1559 (Aug. 5, 1998).

⁹⁹ Chickasaw Telephone Company ("Chickasaw"), Conestoga Wireless Company ("Conestoga") and Golden West Telecommunications Cooperative ("Golden West") (on reply) opposed the permanent waiver request. The Cellular Telecommunications Industry Association ("CTIA") supported the permanent waiver.

¹⁰⁰ See Update to Waiver Request of VoiceStream PCS I License L.L.C. to Reflect Rule and Policy Changes Resulting from Report and Order in WT Docket No. 98-205, File No. CWD 98-89, filed by VoiceStream PCS I License L.L.C. (Nov. 19, 1999) ("*VoiceStream Update*").

¹⁰¹ Accordingly, we do not address the arguments made by Chickasaw, Conestoga, Golden West, and CTIA.

¹⁰² See *VoiceStream Update* at 7. The Commission's Order with respect to the VoiceStream/Omnipoint transaction was released on February 15, 2000. Therefore, VoiceStream's request is in essence a request for a waiver through September 1, 2000. We note that, while VoiceStream asked that it be allowed to postpone compliance in the Oklahoma City MTA, VoiceStream exceeds our spectrum aggregation limits only in Oklahoma RSAs 7 and 8, both of which are entirely within the Oklahoma City BTA, which in turn, is a part of the Oklahoma City MTA.

¹⁰³ These markets include the Bismarck, ND, Fargo, ND, and Sioux Falls, SD MSAs, and the following RSAs: KS 3, KS 4, KS 10, MN 1, MN 2, MN 7, MN 8, MN 9, ND 2, ND 3, ND 4, ND 5, SD 2, SD 3, SD 4, SD 6, SD 7, SD 8, and

involving a 25 MHz cellular license, a 10 MHz BTA-based PCS license, and a 30 MHz MTA-based PCS license (either Minneapolis-St. Paul or Kansas City). In three cases, these overlaps involve cellular MSAs (Bismarck, Fargo, and Sioux Falls) and will require the divestiture of 20 MHz of spectrum to meet our general 45 MHz cap. Elsewhere, in rural cellular markets, where the cap is 55 MHz, a divestiture of 10 MHz of spectrum would achieve compliance with the Commission's rules.

36. Applicants request interim waivers of the spectrum cap rule with respect to each of these markets.¹⁰⁴ Specifically, the Applicants request interim waivers of section 20.6 until six months following the later of Commission action on the VoiceStream/Omnipoint applications or Commission action on the instant applications.¹⁰⁵ We note that the Commission's rules require consummation of the transfers of control within 180 days after release of this Order,¹⁰⁶ and divestitures sufficient to come into compliance with the Commission's spectrum aggregation limits prior to such consummation.¹⁰⁷ Thus, without a waiver, the Applicants would have up to 180 days following release of this Order to come into compliance, depending on when they consummate the transfers of control.

37. As discussed below, we believe that this proposed transaction will promote competition by furthering the development of an additional nationwide PCS system. As we have discussed above, the instant transaction is related to the recent merger between VoiceStream and Omnipoint. In that case, because of the extent of divestitures required and the consequent need for an orderly divestiture process, the Commission granted VoiceStream and Omnipoint a limited additional amount of time to effect these divestitures.¹⁰⁸ Specifically, the Commission gave the parties to the VoiceStream/Omnipoint transaction 90 days after consummation of the merger between the companies, or 180 days following release of the *VoiceStream/Omnipoint Order*, whichever was earlier.¹⁰⁹ The *VoiceStream/Omnipoint Order* was released on February 15, 2000, and the parties consummated on February 25, 2000.¹¹⁰ As a result, the deadline for compliance for properties at issue in the *VoiceStream/Omnipoint Order* is May 25, 2000.

38. We find that the same justifications for granting a waiver of section 20.6(e)(1) in the context of the VoiceStream/Omnipoint transaction are also present in the instant transaction, particularly given that the two transactions are related, they involve the same transferee

SD 9.

¹⁰⁴ Public Interest Statement at 15-17.

¹⁰⁵ *Id.* at 15.

¹⁰⁶ 47 C.F.R. § 1.948(d).

¹⁰⁷ 47 C.F.R. § 20.6(e)(1).

¹⁰⁸ See *VoiceStream/Omnipoint Order*, FCC 00-53 at ¶32.

¹⁰⁹ *Id.*

¹¹⁰ See Letter from Louis Gurman, Counsel for VoiceStream, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed March 30, 2000.

(VoiceStream), and the divestitures required by the instant transfers of control are likely to be coordinated with those required by the VoiceStream/Omnipoint transaction. We therefore find that the public interest in promoting the development of an additional nationwide PCS system, as well as in ensuring an orderly divestiture process, will be served by providing limited additional time to effect these divestitures. We also note that this request involves a waiver of the Commission's spectrum cap rule, rather than the Commission's cellular cross-ownership restriction,¹¹¹ and that no party raised concerns regarding this request.¹¹² Therefore, we grant the Applicants a waiver of section 20.6(e)(1) such that they will have 90 days after consummation of the instant transfers of control, or 180 days following release of the *VoiceStream/Omnipoint Order* (i.e., August 14, 2000), whichever is earlier, to come into compliance with respect to these 24 markets, including the portions of two RSAs within the Oklahoma City BTA.

b. International Services

39. Aerial and VoiceStream are both currently authorized to resell international switched telecommunications services. As part of the proposed transaction, Aerial and VoiceStream request authority to transfer control of the international section 214 authorization held by Aerial to VoiceStream. We conclude that the proposed transaction would not have anti-competitive effects in any U.S. international service market, including any input market that is essential for the provision of international service.¹¹³ This conclusion is supported by the fact that the Applicants have no U.S. international transport facilities,¹¹⁴ and that this transaction will not eliminate any significant potential participant in the provision of international services.¹¹⁵

40. In reaching our conclusion, we considered whether, as a result of VoiceStream's acquisition of Aerial, Aerial would become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that Aerial is authorized to serve, which could adversely impact competition in the United States. As the Commission has observed in the *Foreign Participation Order*, the exercise of foreign market power in the U.S. market could harm U.S. consumers through increases in prices, decreases in quality, or reductions in alternatives in end user markets.¹¹⁶ Generally, this risk occurs when a U.S. carrier is affiliated with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market.¹¹⁷

¹¹¹ 47 C.F.R. § 22.942.

¹¹² The pleadings filed by Chickasaw, Conestoga and Golden West with respect to VoiceStream's license holdings in portions of the Oklahoma City BTA raised concerns specific to grant of a permanent waiver of the spectrum cap.

¹¹³ *WorldCom/MCI Order*, 13 FCC Rcd at 18,071 ¶ 81.

¹¹⁴ See International Bureau Report: 1998 Section 43.82 Circuit Status Data, Report No. IN 99-36 (rel. Dec. 17, 1999).

¹¹⁵ See *In the Matter of Global Crossing Ltd and Frontier Corporation*, 14 FCC Rcd 15,911 (WTB/CCB/IB 1999); see generally *WorldCom/MCI Order*.

¹¹⁶ *Foreign Participation Order*, 12 FCC Rcd at 23,951-54 ¶¶ 144-46.

¹¹⁷ *Id.* at 23,954 ¶147. As recently amended, Section 63.09(e) of the Commission's rules, 47 C.F.R. § 63.09(e), provides that "[t]wo entities are affiliated with each other if one of them or an entity that controls one of them directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one."

41. VoiceStream certifies, pursuant to section 63.18 of the Commission's rules,¹¹⁸ that it is not a foreign carrier and is not affiliated with a foreign carrier.¹¹⁹ VoiceStream requests that, after the transaction, Aerial's subsidiaries continue to be regulated as non-dominant for the provision of international communications services to all permissible international points.

42. There is no evidence in the record, and we unaware of any information, that contradicts the certifications and statements made by VoiceStream with respect to its foreign affiliations. We therefore find that the proposed transaction would not result in Aerial or its operating subsidiaries acquiring an affiliation with a foreign carrier with market power. This finding supports our conclusion that the transaction would not have anti-competitive effects in any U.S. international service market and would serve the public interest, convenience, and necessity. We also grant, on the basis of this finding, VoiceStream's request to maintain Aerial's classification as a non-dominant carrier on all U.S. international routes.¹²⁰

3. Public Interest Benefits

43. Applicants contend that the proposed merger will generate significant benefits and efficiencies. Applicants argue that consumers will benefit from the creation of a nationwide footprint for GSM subscribers, which will result in additional competition in this market currently served by AT&T Wireless, Sprint PCS, Nextel Communications, and Bell Atlantic/Vodafone.¹²¹ In addition, Applicants claim that the merger of VoiceStream and Aerial will produce benefits through economies of scale and scope, improved spectrum efficiency, and wider availability of advanced services.¹²²

44. We agree with Applicants that GSM subscribers will benefit from the expanded footprint to be offered by VoiceStream, and that all mobile phone users needing access throughout the nation will benefit significantly from the creation of another competitor with a near-nationwide footprint.¹²³ Moreover, the combination of VoiceStream and Aerial will also provide more U.S. consumers with the opportunity to subscribe to a carrier that accommodates

¹¹⁸ 47 C.F.R. § 63.18(h)(1).

¹¹⁹ See Application for Transfer of Control, File No. ITC/T/C-19991202-00810, at 4, filed December 1, 1999, requesting authority to transfer control of international global resale Section 214 authority from Aerial to VoiceStream.

¹²⁰ 47 C.F.R. § 63.10(a)(1), (3) (providing that a U.S. carrier that is not affiliated with a foreign carrier in a particular country shall presumptively be classified as non-dominant).

¹²¹ Public Interest Statement at 2, 10. On March 30, 2000, the Wireless Bureau and International Bureau released an order granting applications filed by Vodafone AirTouch, Plc, and Bell Atlantic Corporation for consent to transfer control of or assign their U.S. wireless licenses and authorizations to a joint venture. See *Applications of Vodafone AirTouch, Plc, and Bell Atlantic Corporation*, Memorandum Opinion and Order, DA 00-721 (WTB/IB rel. Mar. 30, 2000).

¹²² Public Interest Statement at 10.

¹²³ We note that these are the same public interest benefits the Commission found in granting its consent to the VoiceStream/Omnipoint transaction. See *VoiceStream/Omnipoint Order*, FCC 00-53 at ¶¶45-46.

international roaming access, where GSM technology often prevails. While Applicants' remaining claims are certainly plausible, we are unable to gauge the likelihood or significance of these benefits based on the information in this record.¹²⁴

4. Executive Branch Concerns

45. The Executive Branch has raised concerns regarding national security and law enforcement in this proceeding, which, pursuant to the public interest analysis articulated in the Commission's *Foreign Participation Order*, we must consider.¹²⁵ On February 7, 2000, the Applicants, DOJ, and FBI filed a joint petition requesting that the Commission (1) adopt an agreement, dated January 26, 2000, between DOJ, FBI, and VoiceStream ("DOJ/FBI Agreement") that resolves the national security, law enforcement, and public safety concerns of DOJ and FBI, and (2) condition grant of the instant transfer of control applications on the Applicants' compliance with the terms of the DOJ/FBI Agreement.¹²⁶ The DOJ/FBI Agreement provides, *inter alia*, that VoiceStream shall: (1) ensure that its network is configured so as to be capable of complying with lawful U.S. process;¹²⁷ (2) make available in the United States certain call and subscriber data, if VoiceStream stores such data;¹²⁸ and (3) take reasonable measures to monitor the use of facilities used in domestic telecommunications (specifically, with respect to personnel holding sensitive positions),¹²⁹ information storage,¹³⁰ and access to foreign entities.¹³¹ The parties also have agreed to adopt and maintain policies with regard to confidentiality and security of electronic surveillance orders and authorizations, legal process, and statutory authorizations and certifications related to subscriber records and information.

46. In fulfilling our public interest mandate, we take into account the record and afford the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.¹³² We recognize that, separate from our licensing process, VoiceStream has entered into a voluntary agreement with the DOJ, and FBI, and that this agreement expressly states that the DOJ and FBI will not object to grant of the pending applications provided that the Commission approves the agreement and conditions grant of the instant applications on

¹²⁴ See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063 ¶157.

¹²⁵ *Foreign Participation Order*, 12 FCC Rcd at 23,918 ¶ 59.

¹²⁶ See DOJ/FBI Petition to Adopt at 3-4. The DOJ/FBI Agreement was originally submitted in the VoiceStream/Omnipoint proceeding, and contemplated the VoiceStream/Aerial transaction. In their petition, the DOJ and FBI state that their specific concerns with regard to VoiceStream's indirect foreign ownership are described more fully in their similar submission made in the VoiceStream/Omnipoint proceeding. *Id.* at 3.

¹²⁷ *Id.* at Exhibit 1(DOJ/FBI Agreement), Art. 1. A copy of the DOJ/FBI Agreement is attached hereto as Appendix A.

¹²⁸ *Id.*

¹²⁹ *Id.* at Art. 2.

¹³⁰ *Id.* at Art. 1.

¹³¹ *Id.* at Art. 2.

¹³² See *Foreign Participation Order*, 12 FCC Rcd at 23,919-21 ¶¶ 61-66.

compliance with it.¹³³

47. We note that the DOJ/FBI Agreement contains certain provisions relevant to this transaction that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part, and we will consider any subsequent agreements on a case-by-case basis. However, notwithstanding these concerns about the broader implications of the DOJ/FBI Agreement, we see no reason to modify or disturb the agreement of the parties on this matter. Therefore, in accordance with the request of the Applicants, the DOJ, and FBI, and the discussion above, we condition our grant of the applications to transfer certain licenses and authorizations in connection with the proposed merger on compliance with the DOJ/FBI Agreement.

IV. CONCLUSION

48. Based upon our reviews under sections 214(a), 310(b), and 310(d) of the Act, we determine that the proposed transfers of control will not likely result in harm to competition in any relevant market. We also determine that they will likely result in several public interest benefits. We therefore conclude that, on balance, Applicants have demonstrated that these transfers serve the public interest, convenience, and necessity. Accordingly, we grant the Applications, subject to the conditions set forth herein.

V. ORDERING CLAUSES

49. IT IS ORDERED that, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214(a), 214(c), 309, 310(b), 310(d), the Joint Petition to Adopt Conditions to Authorization and Licenses filed by Aerial Communications, Inc., VoiceStream Wireless Holding Corporation, the Federal Bureau of Investigation and the U.S. Department of Justice IS GRANTED.

50. IT IS ORDERED that, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214(a), 214(c), 309, 310(b), 310(d), the authorizations and licenses referenced herein and related thereto are subject to compliance with provisions of the Agreement between VoiceStream, the United States Department of Justice, and the United States Federal Bureau of Investigation, dated January 26, 2000, filed with the Commission on January 28, 2000 and February 7, 2000, and attached hereto as Appendix A, which Agreement is fully binding upon VoiceStream and its subsidiaries, successors, and assigns that provide telecommunications services within the United States. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. §§ 222(a) and (c)(1) and the Commission's implementing regulations.

¹³³ DOJ/FBI Agreement at Art. 4.7.

51. IT IS ORDERED that, pursuant to sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and Section 1.2 of the Commission's Rules, 47 C.F.R. §1.2, the Petition for Declaratory Ruling – Compliance with Section 20.6 of the Commission's Rules filed by VoiceStream Wireless Corporation, VoiceStream Wireless Holding Corporation, Aerial Communications, Inc., and Telephone and Data Systems, Inc. IS GRANTED to the extent indicated herein and otherwise is DENIED.

52. IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the authorizations and licenses referenced herein and related thereto are subject to the condition that the parties come into compliance with 47 C.F.R. § 20.6 within 90 days after consummation of the instant transfers of control, or within 180 days following release of the *VoiceStream/Omnipoint Order* (i.e., August 14, 2000), whichever is earlier, with respect to the above-referenced 24 markets, including the portions of two RSAs within the Oklahoma City BTA.

53. IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 309, 310(d), the Comments of Conestoga Wireless Company filed September 9, 1998, the Comments of Chickasaw Telephone Company filed September 9, 1998, the Comments of the Cellular Telecommunications Industry Association filed September 10, 1998, and the Reply Comments of Golden West Telecommunications Cooperative filed on September 25, 1998 with respect to the Request of VoiceStream PCS I License L.L.C.'s for Waiver of Section 20.6 of the Commission's Rules, ARE DISMISSED as moot.

54. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(b), 310(d), that the above-referenced applications filed by Aerial Communications, Inc., VoiceStream Wireless Corporation, and VoiceStream Wireless Holding Company in the above-captioned proceeding ARE GRANTED subject to the above conditions.

55. This action is taken on delegated authority under sections 0.261 and 0.331 of the Commission's rules, 47 C.F.R. §§0.261, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau

Donald Abelson
Chief, International Bureau

APPENDIX A

DOJ/FBI AGREEMENT

APPENDIX A

DOJ/FBI AGREEMENT

AGREEMENT

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FCC MAY 2000

This AGREEMENT is made this 26th day of January, 1999, by and between VOICESTREAM WIRELESS CORPORATION ("VOICESTREAM WIRELESS") AND VOICESTREAM WIRELESS HOLDING CORPORATION ("VOICESTREAM HOLDINGS") (VOICESTREAM WIRELESS AND VOICESTREAM HOLDINGS ARE COLLECTIVELY REFERRED TO AS "VOICESTREAM"), AND THE U.S. DEPARTMENT OF JUSTICE ("DOJ"), and THE FEDERAL BUREAU OF INVESTIGATION ("FBI") (COLLECTIVELY WITH ALL OTHER PARTIES HERETO, "THE PARTIES").

RECITALS

WHEREAS, the U.S. telecommunications system is essential to U.S. national security, law enforcement, and public safety;

WHEREAS, the U.S. Government considers it critical to maintain the viability, integrity, and security of that system (see e.g., Presidential Decision Directive 63 on Critical Infrastructure Protection);

WHEREAS, protection of Classified, Controlled Unclassified, and Sensitive Information is critical to U.S. national security;

WHEREAS, VoiceStream operates a major wireless Domestic Telecommunications network under licenses granted to it and its subsidiaries by the Federal Communications Commission ("FCC");

WHEREAS, VoiceStream has filed with the FCC in Docket DA 99-1634 applications that would result in the transfer and assignment of numerous licenses held by VoiceStream Wireless Corporation and Omnipoint Corporation ("Omnipoint") or their respective related entities to VoiceStream Holdings and related entities. VoiceStream has also filed with the FCC, or is about to file, applications that would result in the transfer of numerous licenses held by Aerial Communications Corporation ("Aerial") and its subsidiaries to VoiceStream Holdings. VoiceStream also has sought authority in its application to allow the existing permissible 49.9% level of indirect foreign ownership in VoiceStream Wireless to apply to VoiceStream Holdings and its operating subsidiaries that it will acquire as a result of the mergers;

WHEREAS, VoiceStream's application in Docket DA 99-1634 requires approval from the FCC, and such approval may be made subject to conditions relating to national security, law enforcement, and public safety;

WHEREAS, on October 5, 1999, the FBI and the DOJ filed a petition with the FCC to defer

consideration of the Omnipoint license applications, pending agreement between VoiceStream and the DOJ and the FBI to resolve national security, law enforcement and public safety concerns of the DOJ and the FBI;

WHEREAS, by Executive Order 12661, the President, pursuant to Section 721 of the Defense Production Act, as amended, authorized the Committee on Foreign Investment in the United States ("CFIUS") to review, for national security purposes, foreign acquisitions of U.S. companies; and

WHEREAS, VoiceStream has met with the FBI and the DOJ to discuss their concerns. In these meetings, VoiceStream has represented that (a) no single foreign entity shall have, as a result of the mergers, more than a 40% interest in VoiceStream, (b) no foreign individual or entity has or shall have, as a result of the mergers, effective or de facto Control of VoiceStream, (c) it will not provide, direct, control, supervise or manage Domestic Telecommunications through facilities located outside the United States, (d) it has no present plans, and is aware of no present plans of any other entity, as a result of which a foreign individual or entity would gain an ownership interest in VoiceStream that exceeds 40%, (e) it has no present plans, and is aware of no present plans of any other entity, as a result of which a foreign individual or entity would gain effective or de facto Control of VoiceStream, and (f) it has no present plans, and is aware of no present plans of any other entity, as a result of which it will provide, direct, control, supervise or manage Domestic Telecommunications through facilities located outside the United States.

NOW THEREFORE, the Parties are entering into this Agreement to address national security, law enforcement and public safety concerns.

ARTICLE I: INFORMATION STORAGE AND ACCESS

- 1.1 VoiceStream shall comply with all applicable FCC rules and regulations governing access to and storage of Customer Proprietary Network Information ("CPNI"), as defined in 47 U.S.C. § 222(f)(1).
- 1.2 VoiceStream shall insure that at all times its network is configured such that VoiceStream will be capable of complying in an effective, efficient, and unimpeded fashion, with Lawful U.S. Process, and that VoiceStream's officials in the United States will have unconstrained authority to comply, in an effective, efficient, and unimpeded fashion, with Lawful U.S. Process.
- 1.3 VoiceStream shall make available in the United States:
 - (i) any Domestic Telecommunications (including any other type of wire, voice or electronic communication not covered by the definitions of Wire Communication or Electronic Communication) if VoiceStream stores such communication for any reason;

- (ii) any Wire Communications or Electronic Communications (including any other type of wire, voice or electronic communication not covered by the definitions of Wire Communication or Electronic Communication) received by, intended to be received by, or stored in the account of a VoiceStream U.S. customer or subscriber, if VoiceStream stores such communication for any reason;
 - (iii) any Transactional Data relating to Domestic Telecommunications, if VoiceStream stores such data for any reason;
 - (iv) any Subscriber Information concerning VoiceStream's U.S. customers and subscribers if VoiceStream stores such information for any reason; and
 - (v) any Call Associated Data relating to Domestic Telecommunications, if VoiceStream stores such data for any reason.
- 1.4 VoiceStream shall store for at least two years all billing records of VoiceStream U.S. customers and subscribers and shall make such records available in the United States.
- 1.5 VoiceStream shall store in the United States any information relating to a VoiceStream U.S. customer or subscriber, or relating to any communication of such customer or subscriber, or any information relating to Domestic Telecommunications, in each case to the extent VoiceStream has access thereto and when the U.S. Government has requested such storage pursuant to 18 U.S.C. § 2703(f).
- 1.6 VoiceStream shall store the data and communications described in paragraphs 1.2 through 1.4 in a manner not subject to mandatory destruction under any foreign laws, if VoiceStream stores such data and communications for any reason.

ARTICLE II: SECURITY

- 2.1 VoiceStream shall maintain within the United States its security office.
- 2.2 VoiceStream shall take all reasonable measures to prevent the use of or access to VoiceStream's equipment or facilities, including monitoring points associated with Sensitive Network Positions, to conduct Electronic Surveillance in violation of any U.S. federal, state, or local laws or the terms of this Agreement. These measures shall take the form of detailed technical, organizational, personnel-related policies and written procedures, and necessary implementation plans.
- 2.3 VoiceStream shall not provide access to Domestic Telecommunications, Call Associated Data, Transactional Data, or U.S. Subscriber Information stored in the United States to any person if the purpose of such access is to respond to the legal process or the request of a foreign government or a component or subdivision thereof without the express

written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any requests or submission of legal process described in this paragraph shall be reported to the DOJ as soon as possible and in no event later than five business days after such request.

- 2.4 VoiceStream shall not, directly or indirectly, disclose or permit disclosure of, or provide access to, Classified or Sensitive Information, Subscriber Information, Transactional Data, or Call Associated Data, or a copy of any Wire Communication or Electronic Communication intercepted by a U.S. federal, state or local government agent to any foreign government or a component or subdivision thereof without the express written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any requests or any legal process submitted by a foreign government or a component or subdivision thereof to VoiceStream for the communications, data or information identified in this paragraph that is maintained by VoiceStream shall be referred to the DOJ as soon as possible and in no event later than five business days after such request unless the disclosure of the request or legal process would be in violation of an order of a court of competent jurisdiction within the United States.
- 2.5 At least every 3 months, VoiceStream shall notify DOJ in writing of legal process or requests by foreign non-governmental entities for access to or disclosure of Domestic Telecommunications unless the disclosure of the legal process or requests would be in violation of an order of a court of competent jurisdiction within the United States.
- 2.6 Within sixty (60) days after the Effective Date, VoiceStream shall designate points of contact within the United States with the authority and responsibility for accepting and overseeing the carrying out of Lawful U.S. Process. The points of contact shall be available 24 hours per day, 7 days per week and shall be responsible for accepting service and maintaining the security of Classified Information and any Lawful U.S. Process for electronic surveillance in accordance with the requirements of U.S. law. VoiceStream shall immediately notify in writing the DOJ and the FBI of any change in such designation or contact information. The points of contact shall be U.S. citizens who are eligible for appropriate U.S. security clearances. VoiceStream shall comply with any U.S. government request that a background check and/or security clearance process be completed for a designated point of contact.
- 2.7 VoiceStream shall protect the confidentiality and security of all Lawful U.S. Process served upon it and the confidentiality and security of Classified Information and Sensitive Information in accordance with U.S. Federal and state law or regulation.
- 2.8 VoiceStream shall:
 - (i) take appropriate measures to prevent unauthorized access to data or facilities that might contain Classified Information or Sensitive Information;

(ii) assign U.S. citizens, who meet high standards of trustworthiness for maintaining the confidentiality of Sensitive Information, to positions that handle or that regularly deal with information identifiable to such person as Sensitive Information;

(iii) require that personnel handling Classified Information shall be eligible for and shall have been granted appropriate security clearances;

(iv) provide that the points of contact described in Section 2.6 shall have sufficient authority over any of its employees who may handle Classified Information or Sensitive Information to maintain the confidentiality and security of such information; and

(v) maintain appropriately secure facilities (e.g., offices) for the handling and storage of any Classified Information and Sensitive Information.

- 2.9 VoiceStream shall instruct appropriate officials, employees, contractors and agent as to their obligations under this Agreement and issue periodic reminders to them of such obligations.

ARTICLE III: DISPUTES AND NON-IMPACT ON OTHER GOVERNMENT ACTIONS

- 3.1 Nothing contained in this Agreement shall limit or affect the authority of a United States Government agency to deny, limit or revoke VoiceStream's access to Classified, Controlled Unclassified, and Sensitive Information under its jurisdiction.
- 3.2 The Parties shall use their best efforts to resolve any disagreements that may arise under this Agreement. Disagreements shall be addressed, in the first instance, at the staff level by the Parties' designated representatives. Any disagreement that has not been resolved at that level shall be submitted promptly to higher authorized officials, unless the DOJ or the FBI believes that important national interests can be protected, or VoiceStream believes that paramount commercial interests can be resolved, only by resorting to the measures set forth in Section 3.3 below. If, after meeting with higher authorized officials, either party determines that further negotiation would be fruitless, then either party may resort to the remedies set forth in Section 3.3 below. If resolution of a disagreement requires access to Classified Information, the Parties shall designate a person possessing the appropriate security clearances.
- 3.3 Subject to section 3.2 of this Agreement, if any Party believes that any other Party has breached or is about to breach this Agreement, that Party may bring an action against the other Party for appropriate judicial relief. Nothing in this Agreement shall limit or affect the right of a U.S. Government agency to seek revocation by the FCC of any license, permit, or other authorization granted or given by the FCC to VoiceStream, or any other

sanction by the FCC against VoiceStream, or the right to seek civil sanctions for any violation by VoiceStream of any U. S. law or regulation or term of this Agreement.

- 3.4 The availability of any civil remedy under this Agreement shall not prejudice the exercise of any other civil remedy under this Agreement or under any provision of law, nor shall any action taken by a Party in the exercise of any remedy be considered a waiver by that Party of any other rights or remedies. The failure of the DOJ or the FBI to insist on strict performance of any of the provisions of this Agreement, or to exercise any right they grant, shall not be construed as a relinquishment or future waiver, rather, the provision or right shall continue in full force. No waiver by the DOJ or the FBI of any provision or right shall be valid unless it is in writing and signed by the DOJ or the FBI.
- 3.5 It is agreed by and between the Parties that a civil action for judicial relief with respect to any dispute or matter whatsoever arising under, in connection with, or incident to, this Agreement shall be brought, if at all, in the United States District Court for the District of Columbia.
- 3.6 Nothing in this Agreement limits the right of the United States Government to pursue criminal sanctions against VoiceStream, or any director, officer, employee, representative, or agent of VoiceStream, for violations of the criminal laws of the United States.

ARTICLE IV: OTHER REPRESENTATIONS AND OBLIGATIONS OF THE PARTIES

- 4.1 VoiceStream represents that, to the best of its knowledge, it has and shall continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform its obligations hereunder and that this Agreement is a legal, valid, and binding obligation of VoiceStream enforceable in accordance with its terms.
- 4.2 VoiceStream shall provide to the DOJ and FBI written notice and copies of any applications or petitions relating to the Control of VoiceStream filed with the FCC or any other governmental agency concurrently with such filing.
- 4.3 VoiceStream shall provide to the DOJ and FBI written notice within 14 days of learning that any single foreign entity has or will likely increase its ownership interest in VoiceStream above 40%. Such notice shall, at a minimum, (a) identify the entity (specifying the name, addresses and telephone numbers of the entity), (b) identify the beneficial owners of the increased or prospective increased interest in VoiceStream by the entity (specifying the name, addresses and telephone numbers of each beneficial owner), (c) quantify the amount of ownership interest in VoiceStream that the entity holds or will likely hold, and (d) include a description of the transaction that has resulted in or will likely result in the entity increasing its ownership interest in VoiceStream above 40%.

- 4.4 VoiceStream shall provide to the DOJ and FBI 30 days advance written notice if VoiceStream plans to provide, direct, control, supervise or manage Domestic Telecommunications through any facilities located outside the United States. Such notice shall, at a minimum, (a) include a description of the facilities to be located outside the United States, and a description of the functions of the facilities and (b) identify the location where the facilities are to be located.
- 4.5 VoiceStream shall provide to the DOJ and FBI 30 days advance notice if VoiceStream plans to store any Domestic Telecommunications, Call Associated Data, Transactional Data or Subscriber Information outside the United States. Such notice shall, at a minimum, (a) include a description of the type of information to be stored outside the United States, (b) identify the custodian of the information if other than VoiceStream, and (c) identify the location where the information is to be located.
- 4.6 Upon the execution of this Agreement, the DOJ and the FBI shall promptly notify the FCC that, provided the FCC approves this Agreement and adopts the Condition to FCC Licenses attached hereto as Exhibit A, the DOJ and the FBI have no objection to the grant of the proposed transfers of Control and related assignments of VoiceStream Wireless' and Omnipoint's licenses that are the subject of the application filed with the FCC in Docket DA 99-1634.
- 4.7 Provided that (a) the FCC approves this Agreement and adopts the Condition to FCC Licenses, and (b) VoiceStream complies with the terms of this Agreement, the Attorney General shall not make any objection concerning the current foreign investment in VoiceStream or VoiceStream Holdings' acquisition of Control of VoiceStream, Omnipoint or Aerial to the CFIUS or the President. This commitment, however, does not extend to any objection the Attorney General may wish to raise with the CFIUS or the President in the event (a) that the Attorney General learns that the representations of VoiceStream recited above are untrue or incomplete, (b) of any change in the level of foreign investment in VoiceStream, (c) of any change in the level of foreign Control of VoiceStream or (d) any material change in the circumstances associated with the transactions at issue.
- 4.8 VoiceStream has entered into or may enter into joint ventures or other arrangements under which a joint venture or another entity may provide Domestic Telecommunications Services. If VoiceStream Controls such entity, then that entity shall fully comply with the terms of this Agreement. To the extent VoiceStream does not Control such an entity, VoiceStream shall in good faith endeavor to have such entity comply with this Agreement and shall consult with the DOJ or the FBI about the activities of such entity.
- 4.9 VoiceStream shall report promptly to the DOJ and FBI any information VoiceStream acquires regarding: (i) a breach of this Agreement; (ii) Electronic Surveillance conducted in violation of federal, state or local law or regulation; (iii) access to or disclosure of

CPNI or Subscriber Information in violation of federal, state or local law or regulation (except for violations of FCC regulations relating to improper use of CPNI); or (iv) improper access to or disclosure of Classified Information or Sensitive Information. VoiceStream need not report information where disclosure of such information would be in violation of an order of a court of competent jurisdiction.

- 4.10 Unless otherwise specified in this Agreement, the provisions of this Agreement shall take effect immediately upon the execution of this Agreement, except that the provisions in Articles I and II shall take effect on the Effective Date.

ARTICLE V: DEFINITION OF TERMS

As used in this Agreement:

- 5.1 "Affiliate" means any entity that VoiceStream Controls.
- 5.2 "Call Associated Data" or "CAD" means any information related to a communication or related to the sender or recipient of that communication and includes without limitation subscriber identification, called party number, calling party number, start time, end time, call duration, feature invocation and deactivation, feature interaction, registration information, user location, diverted to number, conference party numbers, dual tone multi frequency (dial digit extraction), in-band and out-of-band signaling, and party add, drop and hold.
- 5.3 "Classified Information" means any information that has been determined pursuant to Executive Order 12958, or any predecessor or successor order, or the Atomic Energy Act of 1954, or any statute that succeeds or amends the Atomic Energy Act, to require protection against unauthorized disclosure.
- 5.4 "Control" and "Controls" means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an entity, or by proxy voting, contractual arrangements, or other means, to determine, direct, or decide matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding:
- (1) The sale, lease, mortgage, pledge, or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;
 - (2) The dissolution of the entity;
 - (3) The closing and/or relocation of the production or research and development facilities of the entity;

- (4) The termination or non-fulfillment of contracts of the entity;
 - (5) The amendment of the articles of incorporation or constituent agreement of the entity with respect to the matters described in paragraphs (1) through (4) above; or
 - (6) The matters covered by this Agreement.
- 5.5 "Controlled Unclassified Information" means unclassified information, the export of which is controlled by the International Traffic in Arms Regulations (ITAR), 22 C.F.R. Chapter I, Subchapter M, or the Export Administration Regulations (EAR), 15 C.F.R., Chapter VII, Subchapter C.
- 5.6 "Domestic Telecommunications" means (i) Wire Communications or Electronic Communications (whether stored or not) from one U.S. location to another U.S. location and (ii) the U.S. portion of a Wire Communication or Electronic Communication (whether stored or not) that originates or terminates in the U.S.
- 5.7 "Effective Date" means the date of consummation of the transfer of Control of Omnipoint's FCC licenses to VoiceStream Holdings.
- 5.8 "Electronic Communication" has the meaning given it in 18 U.S.C. § 2510(12).
- 5.9 "Electronic Surveillance" means (i) the interception of wire, oral, or electronic communications as defined in 18 U.S.C. §§ 2510(1), (2), (4) and (12), respectively, and electronic surveillance as defined in 50 U.S.C. § 1801(f); (ii) access to stored wire or electronic communications, as referred to in 18 U.S.C. § 2701 et seq.; (iii) acquisition of dialing or signaling information through pen register or trap and trace devices or other devices or features capable of acquiring such information pursuant to law as defined in 18 U.S.C. § 3121 et seq. and 50 U.S.C. § 1841 et seq.; (iv) acquisition of location-related information concerning a telecommunications service subscriber; (v) preservation of any of the above information pursuant to 18 U.S.C. § 2703(f); and (vi) including access to, or acquisition or interception of, communications or information as described in (i) through (v) above and comparable State laws.
- 5.10 "Intercept" or "Intercepted" has the meaning defined in 18 U.S.C. § 2510(4).
- 5.11 "Lawful U.S. Process" means U.S. federal, state or local Electronic Surveillance orders or authorizations, and other orders, legal process, statutory authorizations, and certifications for access to Wire Communications, Electronic Communications, Call Associated Data, Transactional Data or Subscriber Information authorized by U.S. federal, state or local law.

- 5.12 "Parties" has the meaning given it in the Preamble.
- 5.13 "Sensitive Information" means unclassified information regarding (i) the persons or facilities that are the subjects of Lawful U.S. Process, (ii) the identity of the government agency or agencies serving such Lawful U.S. Process, (iii) the location or identity of the line, circuit, transmission path, or other facilities or equipment used to conduct Electronic Surveillance, (iv) the means of carrying out Electronic Surveillance, (v) the type(s) of service, telephone number(s), records, communications, or facilities subjected to Lawful U.S. Process, and (vi) other unclassified information designated in writing by an authorized official of a federal, state or local law enforcement agency or a U.S. intelligence agency as "Sensitive Information."
- 5.14 "Sensitive Network Position" means a position that involves access to VoiceStream's facilities, systems, or equipment that enables a person to monitor a subscriber's Wire Communications or Electronic Communications, including any such communications that are in electronic storage. The term excludes a position the only responsibilities of which are (1) performing outside plant operations and maintenance functions, (2) performing network-level monitoring or other routine billing- or collections-related duties without the ability to monitor the content of a subscriber's communications, or (3) monitoring customer service, collections, or telemarketing calls by VoiceStream personnel or customer-originating calls to VoiceStream.
- 5.15 "Subscriber Information" means information of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c) or (d) or 18 U.S.C. § 2709. Such information shall also be considered Subscriber Information when it is sought pursuant to the provisions of other Lawful U.S. Process.
- 5.16 "Transactional Data" means:
- (1) "call-identifying information," as defined in 47 U.S.C. § 1001(2), including without limitation the telephone number or similar identifying designator associated with a communication;
 - (2) Internet address or similar identifying designator associated with a communication;
 - (3) the time, date, size, and duration of a communication;
 - (4) any information possessed by the provider relating to identity and physical address of a subscriber, user, or account payer of a provider's communications services;
 - (5) to the extent associated with such subscriber, user, or account payer, any information possessed by the provider relating to all telephone numbers, Internet

addresses, or similar identifying designators; the physical location of equipment, if known and if different from the location information provided under (6) below; types of services; length of service; fees; and usage, including billing records; and

- (6) as to any mode of transmission (including without limitation mobile transmissions), and to the extent permitted by U.S. laws, any information indicating as closely as possible the physical location to or from which a communication is transmitted.

The term does not include the content of any communication.

- 5.17 "United States" means the United States of America including all of its States, districts, territories, possessions, commonwealths, and the special maritime and territorial jurisdiction of the United States.

- 5.18 "Wire Communication" has the meaning given it in 18 U.S.C. § 2510(1).

- 5.19 Other capitalized terms used in this Agreement and not defined in this Article VII shall have the meanings assigned them elsewhere in this Agreement. The definitions in this Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as to the feminine and neuter genders of such term. Whenever the words "include," "includes," or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation."

ARTICLE VI: FREEDOM OF INFORMATION ACT

- 6.1 The DOJ and FBI shall take all reasonable measures to protect from public disclosure all information submitted by VoiceStream to the DOJ or FBI in connection with this Agreement and clearly marked with the legend "Confidential" or similar designation. Such markings shall signify that it is VoiceStream's position that the information so marked constitutes "trade secrets" and/or "commercial or financial information obtained from a person and privileged or confidential," or otherwise warrants protection within the meaning of 5 U.S.C. § 552(b)(4). If a request is made under 5 U.S.C. § 552(a)(3) for information so marked, and disclosure of any information (including disclosure in redacted form) is contemplated, the DOJ or FBI, as appropriate, shall notify VoiceStream of the intended disclosure as provided by Executive Order 12600, 52 Fed. Reg. 23781 (June 25, 1987). If VoiceStream objects to the intended disclosure and its objections are not sustained, the DOJ or FBI, as appropriate, shall notify VoiceStream of its intention to

release (as provided by Section 5 of E.O. 12600) not later than five business days prior to disclosure of the challenged information.

- 6.2 Nothing in this Agreement shall prevent the DOJ or the FBI from lawfully disseminating information as appropriate to seek enforcement of this Agreement, provided that the DOJ and the FBI take all reasonable measures to protect from public disclosure the information marked as described in Section 6.1.

ARTICLE VII: MISCELLANEOUS

- 7.1 All written communications or other written notice relating to this Agreement, such as a proposed modification, shall be deemed given (1) when delivered personally, (2) if by facsimile upon transmission with confirmation of receipt by the receiving Party's facsimile terminal, (3) if sent by documented overnight courier service on the date delivered, or (4) if sent by mail, five (5) business days after being mailed by registered or certified U.S. mail, postage prepaid, addressed to the Parties' designated representatives at the addresses shown below, or to such other representatives at such other addresses as the Parties may designate in accordance with this Section 7.1:

Department of Justice
Assistant Attorney General
Criminal Division
Main Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Federal Bureau of Investigation
Assistant Director
National Security Division
935 Pennsylvania Avenue, NW
Washington, DC 20535
With a copy to:
the General Counsel

VoiceStream Wireless Holding Corporation
VoiceStream Wireless Corporation
3650 131st Avenue, SE
Bellevue, Washington 98006
Attention: Vice President of Legal Affairs

With a copy to:
Gurman, Blask & Freedman, Chartered
1400 Sixteenth Street, N.W., Suite 500
Washington, D.C. 20036
Attention: Doane F. Kiechel


- 7.2 The table of contents, headings, and article and section headings and numbering in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement.
- 7.3 Nothing in this Agreement is intended to limit or constitute a waiver of (1) any obligation imposed by any U.S. laws on the Parties or by U.S. state or local laws on VoiceStream, (2) any enforcement authority available under any U.S. or state laws, (3) the sovereign immunity of the United States, or (4) any authority over VoiceStream's activities or facilities located outside the United States that the U.S. Government may possess.
- 7.4 All references in this Agreement to statutory provisions shall include any future amendments to such statutory provisions.
- 7.5 Nothing in this Agreement is intended to confer or does confer any rights on any Person other than the Parties and any U.S. Governmental Authorities entitled to effect Electronic Surveillance pursuant to Lawful U.S. Process.
- 7.6 This Agreement may only be modified by written agreement signed by all of the Parties. The DOJ and the FBI agree to consider in good faith possible modifications to this Agreement if VoiceStream believes that the obligations imposed on it under this Agreement are substantially more restrictive than those imposed on other U.S. and foreign licensed service providers in like circumstances in order to protect U.S. national security, law enforcement, and public safety concerns. Any substantial modification to this Agreement shall be reported to the FCC within 30 days after approval in writing by the Parties.
- 7.7 If any portion of this Agreement is declared invalid by a U.S. court of competent jurisdiction, this Agreement shall be construed as if such portion had never existed, unless such construction would constitute a substantial deviation from the Parties' intent as reflected in this Agreement.
- 7.8 This Agreement may be executed in one or more counterparts, each of which shall together constitute one and the same instrument.

- 7.9 This Agreement shall inure to the benefit of, and shall be binding upon, the Parties, and their respective successors and assigns. This Agreement shall also be binding on all Affiliates of VoiceStream.

This Agreement is executed on behalf of the Parties:

Date January 26, 2000

Federal Bureau of Investigation


[Signature]

LARRY R. PARKINSON
[Printed Name]

GENERAL COUNSEL
[Title]

Date _____

United States Department of Justice

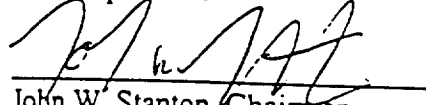
[Signature]

[Printed Name]

[Title]

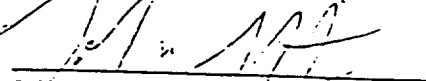
Date 12/2/99

VoiceStream Wireless Holding
Corporation


John W. Stanton, Chairman
and Chief Executive Officer

Date 12/2/99

VoiceStream Wireless Corporation


John W. Stanton, Chairman
and Chief Executive Officer

7.9 This Agreement shall inure to the benefit of, and shall be binding upon, the Parties, and their respective successors and assigns. This Agreement shall also be binding on all Affiliates of VoiceStream.

This Agreement is executed on behalf of the Parties:

Federal Bureau of Investigation

Date _____

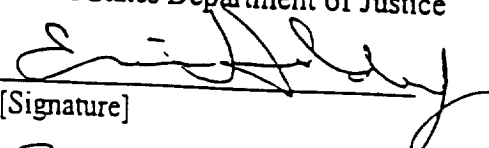
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[Printed Name]

[Title]

United States Department of Justice

Date 1-26-00

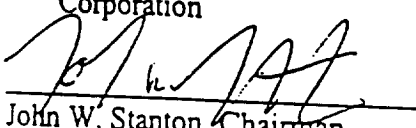

[Signature]

ERIC HOLDER
[Printed Name]

DEPUTY ATT. GEN.
[Title]

VoiceStream Wireless Holding
Corporation

Date 12/2/99


John W. Stanton, Chairman
and Chief Executive Officer

VoiceStream Wireless Corporation

Date 12/2/99

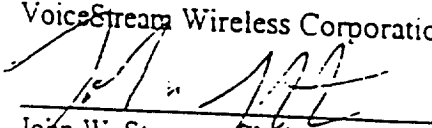

John W. Stanton, Chairman
and Chief Executive Officer

EXHIBIT A

RECEIVED
JAN 28 2000
FCC MAIL ROOM

CONDITION TO FCC LICENSES

IT IS FURTHER ORDERED, that the authorizations and the licenses related thereto are subject to compliance with the provisions of the Agreement attached hereto between VoiceStream Wireless Corporation and VoiceStream Wireless Holding Corporation on the one hand and the Department of Justice (the "DoJ") and the Federal Bureau of Investigation (the "FBI") on the other, dated Jan. 26, 2000 1999, which Agreement is designed to address national security, law enforcement, and public safety concerns of the DoJ and the FBI regarding the authority granted herein. Nothing in this Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations.

66F-HQ-C1299934-D